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No. ___

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

JOHN B. YOUNG,

Petitioner,

vs.

CARL E. LANGLEY, WILBUR E. BOND,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

FIRST ISSUE:

May Prejudgment interest be denied in a §1983 Civil Rights Judgment, upheld on appeal, because the District Judge personally disagreed with the jury verdict, which, as a basis of decision, is a matter in conflict among the Circuits?

SECOND ISSUE:

Whether Title 42 §1988 requires the District Court to apply the law of the state in which it sits to decide a request for prejudgment interest when both 42 U.S.C. §1983 and 28 U.S.C. §1961 are silent on the subject?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW..... i

TABLE OF AUTHORITIES..... iii

OPINIONS BELOW 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 1

JURISDICTION 3

STATEMENT OF CASE 3

REASONS FOR GRANTING THE WRIT 4

I. May Prejudgment interest be denied in a §1983 Civil Rights Judgment, upheld on appeal, because the District Judge personally disagreed with the jury verdict, which, as a basis of decision, is a matter of conflict among the Circuits?..... 4

II. Whether Title 42 §1988 requires the District Court to apply the law of the state in which it sits to decide a request for prejudgment interest when both 42 U.S.C. §1983 and 28 U.S.C. §1961 are silent on the subject?..... 18

TABLE OF AUTHORITIES

Page

Afram Export Corp. v. Metallurgiki Halvps, S.A., 772 F.2d 1358 (7th Cir. 1985).....11, 20

Blackburn v. Snow, 771 F.2d 556 (1st Cir. 1985). 13, 17

Bricklayers' Pension Trust Fund v. Taiariol, 671 F.2d 988 (6th Cir. 1982).....5

Burnett v. Grattan, 468 U.S. 42, 104 S.Ct. 2924, 83 L.Ed. 2d 36 (1984).....20

Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1043, 55 L.Ed. 252 (1978).....22

Chicago M.St. P. & P. R.R. v. Busby, 41 F.2d 617 (9th Cir. 1930).....15

City of Chicago v. U.S. Dept. of Labor, 753 F.2d 606 (7th Cir. 1985).....11

Crown Central Petroleum Corp. v. Nat'l. Union Fire Ins. Co. of Pittsburgh PA, 768 F.2d 632 (5th Cir. 1985).....11

Donovan v. Sovereign Security Ltd., 726 F.2d 55 (2nd Cir. 1984).....11

EEOC v. Erie, 751 F.2d 79 (2nd Cir. 1984).....10, 11

EEOC v. Rath Packing Co., 787 F.2d 319 (8th Cir. 1986).....14, 17, 20

EEOC v. Wooster Brush Co. Employees Relief Ass'n., 727 F.2d 566 (6th Cir. 1984).....20

Earnhardt v. Commonwealth of Puerto Rico, 744 F.2d 1 (1st Cir. 1984).....12, 20

TABLE OF AUTHORITIES–Continued

Page

Eazor Express Inc. v. Int'l. Bros. of Teamsters, 520 F.2d 951, (3rd Cir. 1975) cert. denied 424 U.S. 935, 96 S.Ct. 1149, 47 L.Ed. 2d 342 (1976).....14

Funkhouser v. Preston Co., 290 U.S. 163, 78 L.Ed. 243, 54 S.Ct. 134 (1933).....13

Furtado v. Bishop, 604 F.2d 80 (1st Cir. 1979) cert denied 444 U.S. 1035, 100 S.Ct. 710, 62 L.Ed. 2d 672.....12, 21

GMC v. Devex, 461 U.S. 648, 103 S.Ct. 2058, 76 L.Ed. 2d 211 (1983)..... 5, 6, 15, 17, 22

Glus v. C. Murphy Co., 628 F.2d 248 (3rd Cir. 1980) 13

Hamman v. Southwestern Gas Pipeline Inc., 821 F.2d 299 (5th Cir. 1987) 11

Heiar v. Crawford Cty., 746 F.2d 1190 (7th Cir. 1984) 11, 14, 20

Heritage Homes of Attleboro v. Seekonk Water Dist., 648 F.2d 761 (1st Cir. 1981) cert denied 454 U.S. 898, 102 S.Ct. 398, 70 L.Ed. 2d 213 (1981).....12

Hunter v. Allis-Chalmers Corp., 797 F.2d 1417 (7th Cir. 1986).....11, 20, 21

Johnson v. Railway Exp. Agency, 421 U.S. 454 96 S.Ct. 1717, 44 L.Ed. 2d 295 (1975).....21

Moor v. County of Alameda, 411 U.S. 693, 3 L.Ed. 596, 93 S.Ct. 1785.....19

O'Donnell v. Georgia Osteopathic Hosp., Inc., 748 F.2d 1543 (1984) 16

Osborn v. U.S. Bank, 22 U.S. (9 Wheat) 739, 5 L.Ed. 204 (1824).....6

TABLE OF AUTHORITIES–Continued

Page

Poe v. John Deere Co., 695 F.2d 1103 (8th Cir. 1982) 14

Reichman v. Bonsignore, Birgnati & Mazzotta, PC, 818 F.2d 278 (2nd Cir. 1987) 11

Robertson v. Wegmann, 436 U.S. 584, 98 S.Ct. 1991 (1978) 21

Rodgers v. U.S., 332 U.S. 371, 92 L.Ed 3, 68 S.Ct. 5 (1947) 6, 16, 17, 22

State v. Phillips, 470 P.2d 266 (Alaska 1970) 7

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed. 2d 336 (1969) 19, 20, 22

Sun Ship Inc. v. Matson Navigation Co., 785 F.3d 59 (3rd Cir. 1986) 14

Taylor v. Philips Indus. Inc., 593 F.2d 783 (7th Cir. 1979) 20

Thomas v. Duralite Co., Inc., 524 F.2d 577 (3rd Cir. 1975) 14

Waterside Ocean Navigation Co. v. International Navigation Ltd., 737 F.2d 150 (2nd Cir. 1984) 11

West Virginia v. U.S., 479 U.S. ___, 93 L.Ed. 2d 649, 107 S.Ct. ___ 5, 6, 10, 16, 22

Wildman v. Burlington Northern RR Co., 825 F.2d 1392 (9th Cir. 1987) 15

Williamson v. Handy Button Machine Co., 817 F.2d 1290 (7th Cir. 1987) 8, 21

Wilson v. Burlington N. RR, 803 F.2d 563 (10th Cir. 1986) 15

Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed. 2d 254 (1985) 20

TABLE OF AUTHORITIES–Continued

Page

STATUTES:

28 U.S.C. §1254(1) 3

28 U.S.C. §1331 3

28 U.S.C.A. §1961(a) 3, 7, 18

42 U.S.C.A. §1981 ..... 9, 12

42 U.S.C. §1983 ..... *passim*

42 U.S.C. §1988 ..... 2, 18, 19, 21

42 U.S.C. §2000d 9

MCL 600.6013; MSA 27A.6013 18

CONSTITUTION:

U.S. Const. Amend. XIV, Section 1 1

MISCELLANEOUS:

Comment, Prejudgment Interest: Survey and Suggestion, 77 N.W.U.L. Rev. 192 (1982) 7, 10

Restatement (2nd) of Restitution §528 7

OPINIONS BELOW

The unpublished Opinion of the Sixth Circuit Court of Appeals was issued February 19, 1988. The District Court's Opinion and Order was filed on 4-21-87. The entire Opinion of the Court of Appeals is reproduced in the Appendix. The prejudgment interest portion of the Opinion and Order of the District Court is also reproduced in the Appendix.

The prior appeal to the Sixth Circuit is reported at 793 F.2d 792 (6th Cir. 1986), cert. denied 107 S.Ct. 436 (1986), affirming the Judgment entered January 29, 1985.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend XIV, Section 1.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights,

privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. §1983.

"The jurisdiction in civil . . . matters conferred on the district courts by [the Civil Rights Acts] . . . , for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . . , the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . ." 42 U.S.C. §1988.

"(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The

Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges." 28 U.S.C.A. §1961(a).

JURISDICTION

The jurisdiction of the Federal Court was envoked pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1331. The per curiam opinion of the Sixth Circuit Court of Appeals was issued and filed February 19, 1988. The jurisdiction of the Supreme Court of the United States is envoked under 28 U.S.C. §1254(1) by this filing of a Petition for a Writ of Certiorari within 90 days.

STATEMENT OF CASE

In December, 1980, John Young sued Carl Langley and Wilbur Bond, the then Sheriff and Under Sheriff of Lapeer County, Michigan, for violation of his civil rights, made actionable under 42 U.S.C. §1983 and 28 U.S.C. §1331. Young had served as Deputy Sheriff to the defendants. After Young decided to run for Sheriff, the defendants demoted him to turnkey, suspended him for allegedly allowing a prisoner to escape and then informed the local press. Young claimed the defendants' actions violated his First and Fourteenth Amendment rights and caused him to be damaged.

The case was called for trial in June of 1982, but the jury was discharged due to their inability to reach a

verdict. The case was again called for trial in January, 1983. The jury awarded Young $350,000 in compensatory damages and $400,000 in punitive damages. The Judgment that entered according to the verdict was upheld on appeal. *Young v. Langley*, 793 F.2d 792 (6th Cir. 1986), cert. denied, 107 S.Ct. 436 (1986).

After the appeals were decided, the district court, with modifications, granted Young's motion to tax costs and award attorney fees pursuant to 42 U.S.C. §1988, but denied the part of Young's motion which requested prejudgment interest.

Young appealed the order of denial of prejudgment interest to the Sixth Circuit Court of Appeals. On February 19, 1988, the court issued its per curiam opinion with the dissent of Judge Jones.

REASONS FOR GRANTING THE WRIT

I.

May Prejudgment interest be denied in a §1983 Civil Rights Judgment, upheld on appeal, because the District Judge personally disagreed with the jury verdict, which, as a basis of decision, is a matter in conflict among the Circuits?

Every successful Civil Rights case filed in the Federal Courts presents the issue of whether or not to award prejudgment interest. Besides observing that the award is discretionary, there are no announced

criteria to guide the bench and bar. The District Judge in this case phrased it this way:

> "The general rule regarding such an award in this Circuit is that a District Judge may award this interest in his discretion. *Bricklayers' Pension Trust Fund v. Taiariol*, 671 F.2d 988 (6th Cir. 1982) (Post judgment interest statute 28 U.S.C. §1961, does not bar an award of prejudgment interest by its silence). Most of the cases cited by the parties focus on the rate of interest to be applied in the event that an award is made, rather than the guidelines to be used to determine whether interest should be imposed at all."

The Supreme Court has unanimously held that prejudgment interest "is an element of complete compensation" in a contract case, *West Virginia v. United States*, 479 U.S. ___, 93 L.Ed. 2d 649, 107 S.Ct. ___, and in a patent case, *GMC v. Devex*, 461 U.S. 648, 103 S.Ct. 2058, 76 L.Ed. 2d 211 (1983).

Once a victim of discrimination has proved his or her legal entitlement to a Judgment for damages in a 42 U.S.C.A. §1983 case, " . . . prejudgment interest should ordinarily be awarded absent some justification for withholding such an award . . . " *GMC v. Devex*, supra. In this case, the District Court and the Sixth Circuit held that the *personal* estimation of the judge that the jury verdict was too large was sufficient justification to deny prejudgment interest.

Holding that the personal opinion of the trial judge is a legitimate basis to deny prejudgment interest conflicts with plaintiff's due process rights under the Fourteenth Amendment, and conflicts with settled law defining judicial discretion, as well as conflicting with

the clear holdings of the Supreme Court in *GMC v. Devex*, supra and *West Virginia v. U.S.*, supra, and is antithetical to the theoretical basis for prejudgment interest.

Judicial discretion has never been so broadly defined to include the personal will of the judge. Mr. Chief Justice Marshall addressed judicial discretion in *Osborn v. United States Bank*, 22 U.S. (9 Wheat) 738, 5 L.Ed. 204:

> "Courts are mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion; a discretion to be exercised in discerning the course prescribed by law, and when that is discerned it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the Legislature, or, in other words, to the will of the law."

The Supreme Court held in *Rodgers v. United States*, 332 U.S. 371 (1947) that the discretion to award pre-judgment interest should be decided by whether or not the award would further the congressional purposes expressed in the statute the case was brought under. It is difficult to imagine how the denial of prejudgment interest would advance the salutary goals of enforcing the basic constitutional rights of §1983 claimants.

The theoretical basis for the need of prejudgment interest is the inherent income producing ability of money which cannot be separated from the money

itself.[1] When a plaintiff claims damages from discrimination in a §1983 Complaint filed in Federal Court, his claim must await trial for a judgment to enter. Assume, that two Plaintiffs, B and C were in identical financial circumstances and both were discriminated against such that 42 U.S.C. §1983 gave them equally good cases of liability and that they were identically damaged.[2] Further, that after trial, B and C each received judgment in their favor in the same amount. The only difference between the two is that B's case is tried to judgement two years after filing his complaint, while C's case was not reached for trial until 4 years after filing. Without prejudgment interest, B's case, because of §1961, bears post judgment interest for two years more than does C's. Clearly, then, without prejudgment interest, C gets less for an equal case. If the Complaint is proven at trial, the damage existed or was capable of being expressed in present day dollar terms when the

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[1] Comment, Prejudgment Interest: Survey and Suggestion, 77 N.W.U.L. Rev. 192 (1982) cited by Mr. Justice Marshall, *West Virginia v. United States*, supra.

> 2. [1d] Prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress. *See* Comment, Prejudgment Interest: Survey and Suggestion, 77 Northwestern U. L. Rev. 192 (1982).

See also Restatement (2nd) of Restitution §528.

[2] *State v. Phillips* 470 P.2d 266 (Alaska, 1970) discussed in Prejudgment Interest: Survey and Suggestion, supra. 209-211.

complaint was filed. The complaint having been proven true, the defendant has had the uncompensated use of plaintiff's damages from the day the complaint was filed until Judgment enters. Prejudgment interest only compensates plaintiff for this time value of money expressed in the Judgment.

Conflict in the Circuits:

Upon the facts of this case, there is a precise conflict between the decision of the Sixth Circuit in this case and the Seventh Circuit as announced in *Williamson v. Handy Button*, 817 F.2d 1290 (7th Cir. 1987). Beyond the precise basis of decision used in this case, however, there exists a rift in the decisions of the circuits about prejudgment interest generally.

The majority opinion of the Sixth Circuit holds that prejudgment interest may be denied when the trial judge believes the jury verdict was too large, expressed by the court euphemistically as "compensated fully."

The basis for decision in the District Court was quoted:

> . . . plaintiff has given no indication why an award of prejudgment interest would be particularly appropriate in this case, especially since plaintiff received a substantial award, including punitive damages.* Therefore, the court will not exercise its discretion in this case to award prejudgment interest to plaintiff.

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* It has always been the opinion of the Court that not only were the damages excessive in the light of the evidence but also that it was error the way plaintiff's counsel argued damages to the jury. Neither of these

> subjects were preserved by objection or presented by way of postjudgment motion. Thus they were not considered on appeal and of course, not corrected at the trial court level. Since the Court still feels the damages were greatly in excess of what they should have been, this militates against prejudgment interest.

Upon this record the Sixth Circuit majority opinion held:

> One instance when the denial of the award is appropriate is when, as in this case, the district court concludes that the plaintiff has been compensated fully for the injury he has suffered. In such a case, the plaintiff has been made whole and there is no reason to grant the award.

The Seventh Circuit in *Handy Button*, supra, held precisely the opposite in a case brought under 42 U.S.C.A. §1981 and Title VII of the Civil Rights Act of 1964 42 U.S.C. §2000d. The plaintiff, Williamson, alleged racial discrimination in her employment that rendered her disabled. Upon the jury verdict of $150,000 compensatory damages and $100,000 punitive damages, the trial court was asked to add prejudgment interest. It declined, opining "The verdict, both compensatory and punitive, is in the upper range of what can reasonably be sustained. Adding interest would, in the Court's view, result in an excessive award."

In reversing the denial of prejudgment interest, the Circuit Court succinctly held:

> "It is also significant that the district judge did not deny interest on the ground that it was too hard to figure out what the jury had awarded as back pay. The judge gave a different reason: that the jury had awarded too much money. That reason is reviewable and wrong."

There is also a general conflict among the circuits about prejudgment interest. One commentator, after surveying the decisions in Federal non-diversity cases concludes:

> "The above cases in which courts denied prejudgment interest illustrate the complete lack of guidelines for the judicial exercise of discretion according to considerations of justice."[3]

The recent cases suggest that prejudgment interest is presumptively awarded in the Second, Fifth and Seventh Circuits. The First, Third, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits hold that the award is discretionary with virtually no guidelines to measure when a denial of prejudgment interest is an abuse of discretion.

The Second Circuit, in an Equal Pay Act case, *EEOC v. Erie*, 751 F.2d 79 (2nd Cir. 1984), held that the court should decide prejudgment interest by the relative equities of the parties.[4] The court upheld the

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[3] See Comment Prejudgment Interest, Survey and Suggestion, 77 North Western U.L. Rev. 192, 206-209.

[4] This was disapproved by Mr. Justice Marshall in *West Virginia v. U.S.*, supra, footnote 3:

> 3. The District Court held that whether interest had to be paid depended on a balancing of equities between the parties; the Court of Appeals rejected such an approach, as do we. This is not to say that an equitable consideration such as laches cannot bar an otherwise valid claim for interest, see Board of Comm'rs of Jackson County v. United States, 308 U.S. 343, 352-353, 84 L.Ed. 313, 60 S.Ct. 285 (1939).

award, citing *Donovan v. Sovereign Security, Ltd.*, 726 F.2d 55, 58 (2nd Cir. 1984):

> " . . . it is ordinarily an abuse of discretion *not* to include prejudgment interest in a back pay award under the FLSA."

See also *Waterside Ocean Navigation Co. v. International Navigation Ltd.*, 737 F.2d 150, 154 (2nd Cir. 1984); *Reichman v. Bonsignore, Brignati & Mazzotta, P.C.*, 818 F.2d 278 (2nd Cir. 1987).

In the Fifth Circuit, *Crown Central Petroleum Corp. v. National Union Fire Insurance Company of Pittsburgh, PA*, 768 F.2d 632 (5th Cir. 1985) and *Hamman v. Southwestern Gas Pipeline, Inc.*, 821 F.2d 299 (5th Cir. 1987), both diversity cases strongly suggests that prejudgment interest will be awarded in federal question cases.

The Seventh Circuit in *Heiar v. Crawford County, Wisconsin*, 746 F.2d 1190 (7th Cir. 1984) ordered prejudgment interest in an ADEA case. In *Aframm Export Corp. v. Metallurgik Halvps, S.A.*, 772 F.2d 1358 (7th Cir. 1985) a diversity contract case, prejudgment interest was held to be properly awarded. Likewise in *City of Chicago v. U.S. Department of Labor*, 753 F.2d 606 (7th Cir. 1985). In *Hunter v. Allis Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986) a black employee sued under §1981 and Title VII to a verdict by jury awarding him $25,000 for indignity and stress and $25,000 punitive damages. Circuit Judge Posner, writing for the court held:

> " . . . full compensation requires recognition of the time value of money. But we need not decide today how much if any discretion a district judge retains

> to deny an award of prejudgment interest in a case governed by substantive federal law, since the judge in this case awarded prejudgment interest and in so doing did not abuse her discretion, even if she had discretion in the matter, rather than (as implied by City of Chicago) an absolute duty. The award of prejudgment interest is necessary to put Hunter in the monetary position he would have occupied if Allis-Chalmers had not violated his rights.

This is contrasted by the First Circuit, where the Court initially held that prejudgment interest was discretionary, but that the jury should decide it in a §1983 Civil Rights case, *Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979), cert. den. 444 U.S. 1035, 100 S. Ct. 710, 62 L.Ed. 2d 672. Then, in *Heritage Homes of Attleboro v. Seekonk Water District*, 648 F.2d 761 (1st Cir. 1981), cert. den. 454 U.S. 898, 102 S.Ct. 398, 70 L.Ed. 2d 213 (1981), where a developer of homes sued the water district for discrimination against black persons made actionable by §1983 and §1981, the District Court's award of punitive damages was upheld, and the compensatory damages increased along with prejudgment interest, noting that prejudgment interest was normally within the sound discretion of the Court. Then, in *Earnhardt v. Commonwealth of Puerto Rico*, 744 F.2d 1 (1st Cir. 1984) the court held:

> "It cannot be said that either prejudgment interest or an award for lost fringe benefits must, as a matter of law, be part of the damages awarded in a Title VII case. The question of whether they are necessary to make a plaintiff whole is within the discretion of the district court. This is especially so when the request for such an award comes as an afterthought by the plaintiff."

The next year, the First Circuit decided a case where a prisoner's sister was subjected to body cavity strip search as a pre-condition to a jail visit. After a bench trial, the Plaintiff was awarded $177,000 damages on her §1983 claim together with prejudgment interest, *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985). The verdict was upheld, but the prejudgment interest was vacated because "the court did not detail the bases of its findings" that the award was necessary and " . . . the award itself was large and it was based upon an intangible loss– . . . "[5]

The Third Circuit upheld the denial of prejudgment interest in a Title VII sex discrimination case, *Glus v. G. C. Murphy Co.*, 629 F.2d 248 (3rd Cir. 1980) cert den 449 U.S. 949 (1980), vacated on other grounds, 101 S.Ct. 2013 (1981):

> "Murphy also objects to the district court's decision not to award it prejudgment interest. The general rule is that when the damages are ascertainable "with mathematical precision prejudgment interest

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[5] The Supreme Court in *Funkhouser v. Preston Co.*, 290 U.S. 163 ___ L.Ed. ___, ___ S.Ct. ___ (1933), discredited the denial of prejudgment interest on the distinction between liquidated and unliquidated damages.

> Whether the case is of the one class or the other, the injured party has suffered a loss which may be regarded as not fully compensated if he is confined to the amount found to be recoverable as of the time of breach and nothing is added for the delay in obtaining the award of damages. . . .[I]n the absence of legislation the courts have dealt with the question of allowing interest according to their conception of the demands of justice and practically.

> is awardable as of right." *Eazor Express, Inc. v. International Brotherhood of Teamsters*, 520 F.2d 951, 973 (3rd Cir. 1975), cert. denied, 424 U.S. 935, 96 S.Ct. 1149, 47 L.Ed. 2d 342 (1976). If, however, the claim is not for a liquidated sum, the decision on whether the [to–sic] award interest is within the sound discretion of the court. Id.; *Thomas v. Duralite Co., Inc.* 524 F.2d 577, 589 (3d Cir. 1975). The district court did not abuse its discretion by not awarding prejudgment interest. The International did not unduly delay the litigation. An award of interest here would punish the International unfairly because it exercised its right to proceed to trial."

The Third Circuit assessed attorney fees and double costs against a shipbuilder for frivolously litigating prejudgment interest after arbitration of a shipbuilding contract dispute in *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59 (3rd Cir. 1986).

Similarly, the Eighth Circuit has denied prejudgment interest on an age discrimination case under ADEA in *Poe v. John Deere Co.*, 695 F.2d 1103 (8th Cir. 1982). Later, in a Title VII case, *EEOC v. Rath*, 787 F.2d 318 (8th Cir. 1986), the Court upheld a denial of prejudgment interest.

> "We hold that the district court did not abuse its discretion in denying prejudgment interest. The district court properly weighed the interest of the victims in make-whole relief against the financial impact of a prejudgment interest award in excess of one million dollars on Rath and its owner-employees. The delay (although the fault of neither party) and the uncertainty in determining Rath's backpay liability, on which the interest is to be calculated, were also proper factors for the district court to consider. *Heiar v. Crawford County*, 746

F.2d 1190, 1201 (7th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 3500, 87 L.Ed.2d 631 (1985) . . . "

The Ninth Circuit recently decided a case where prejudgment interest was denied after judgment in a FELA case, *Wildman v. Burlington Northern RR Co.*, 825 F.2d 1392 (9th Cir. 1987):

> In denying the plaintiff's motion, the magistrate relied on *Chicago, M., St. P. & P. R.R. v. Busby*, 41 F.2d 617 (9th Cir. 1930) in which this court held that prejudgment interest was unavailable under the Act. Plaintiff concedes that *Busby* is the controlling law in the Ninth Circuit, but urges the panel to abandon that decision as being based on "an outdated distinction between liquidated and unliquidated damages which has traditionally barred personal injury plaintiffs from recovering prejudgment interest,"
>
> . . . .
>
> "Although the Busby court did not expressly follow this methodology in concluding that prejudgment interest was unavailable in a FELA action, other circuits which have addressed the question in this manner have reached the same conclusion. See *Wilson v. Burlington N. R.R.*, 803 F.2d 563, 563 (10th Cir. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 1604, 94 L.Ed.2d 790 (1987).
>
> "The plaintiff primarily argues that this court abandon Busby, as a matter of policy, because in holding that interest is not allowable in personal injury claims until the amount of damages has been judicially ascertained, the court in Busby relied on an outdated distinction between liquidated and unliquidated damages. Noting that the primary goal of prejudgment interest is full compensation to the injured party, the plaintiff cites a patent infringement case, *General Motors Corp. v.*

Devex Corp., 461 U.S. 648, 103 S.Ct. 2058, 76 L.Ed.2d 211 (1983), to demonstrate the Supreme Court's adoption of this approach and abandonment of the traditional view treating prejudgment interest as a penalty.

> "While the plaintiff's arguments may be sound as to desirable policy of full compensation for injured parties, such policy arguments must be addressed to Congress."

The Eleventh Circuit denied prejudgment interest in a ADEA case on the ground that an award would represent a double recovery for the plaintiff. *O'Donnell v. Georgia Osteopathic Hosp. Inc.*, 748 F.2d 1553 (1984).

This survey of the conflicting and disparate pronouncements of the Circuit Courts display that even though prejudgment interest is necessary to compensate for the delay necessitated by the litigation process, plaintiffs have no assurance that the judicial form will follow the function the award has been held to serve.

For both the Federal bench and the bar " . . . a single nationwide rule is preferable . . . " *West Virginia v. U.S.*, supra, to govern prejudgment interest. The application to Civil Rights cases seems especially appropriate because of the remedial nature of the statutes, as noted by Circuit Judge Jones, writing in dissent in this case:

> "The Supreme Court . . . [has] directed [in *Rodgers v. United States*, 332 U.S. 371, 373 (1947)] that the decision to grant or deny prejudgment interest should hinge on whether to do so would further the congressional purposes underlying the obligations imposed by the statute in question."

Rodgers, supra, was not cited or distinguished by most of the Circuit's upholding the denial of prejudgment interest, including the majority opinion of the Sixth Circuit in this case.

The majority opinion of the Sixth Circuit acknowledges that prejudgment interest is presumptively due, but notes that "a trial court must have some discretion to deny the award in appropriate cases. *GMC v. Devex*." But what facts or factors make an appropriate case?

The District Judge in this case used his personal view of the value of the case as the basis of his opinion to deny prejudgment interest. The majority opinion of the Sixth Circuit acknowledges this and frankly states that even so, it is not an abusive practice. The Eighth Circuit, in *EEOC v. Rath*, supra, similarly said that if the Defendants had to pay prejudgment interest, it may hurt a lot of other employees so the award was denied. Likewise, the First Circuit in *Blackburn v. Snow*, supra, based its decision to deny prejudgment interest, in part, on the view that the verdict itself was large.

It is difficult to understand why the amount of any verdict, subject as it is to postjudgment review by the trial court and appellate review, ought to be a consideration in awarding prejudgment interest.

The conflicting reports of Federal cases in which prejudgment interest is in contest will continue, due, in part, to the fact that a majority of the states have enacted rules governing prejudgment interest. With the state laws offering certainty to litigants a growing number of appeals may be expected in the Federal Courts by litigants searching for guidelines that are

presently lacking. Granting certiorari in this case would fulfill the Supreme Court's leadership duty.

II.

Whether Title 42 §1988 requires the District Court to apply the law of the state in which it sits to decide a request for prejudgment interest when both 42 U.S.C. §1983 and 28 U.S.C. §1961 are silent on the subject?

The opinion of the Sixth Circuit did not discuss this issue, although it was briefed by both sides on appeal as well as at the District Court. The theory is both simple and elegant: Since Congress has not provided for prejudgment interest in 18 U.S.C. §1961 nor in Title 42 §1983, the void is filled by state law on the authority of 42 U.S.C. §1988. The pertinent language of §1988 is:

> " . . . 'in all cases where [federal civil rights laws] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . . , the common law, as modified and changed by the constitution *and statutes of the state wherein the Court having jurisdiction of such . . . case is held,* so far as the same is not inconsistent with the Constitution and laws of the United States shall be extended to and govern the said courts in the trial and disposition of the case . . . ' " (emphasis supplied)

The Michigan statute, MCL 600.6013; MSA 27A.6013, in effect on December 16, 1980, (the date Plaintiff's Complaint was filed in the District Court) provides, in pertinent part:

> "(4) For complaints filed on or after June 1, 1980, interest shall be calculated from the date of filing the Complaint to the date of satisfaction of

> the judgment at the rate of 12% per year compounded annually unless the judgment is rendered on a written instrument having a higher rate of interest. In [that] case interest shall be [calculated] at the rate specified in the instrument if [the] rate was legal at the time the instrument was executed. The rate [shall not] exceed [13%] per year [compounded annually] after the date judgment is entered."

The Supreme Court has commanded that both federal and state rules on damages be employed to best serve Congress' policy goals of the Civil Rights statute. In *Moor v. County of Alameda*, 411 U.S. 693, 36 L.Ed. 596, 93 S. Ct. 1785, the Court held that:

> "[10] The role of §1988 in the scheme of federal civil rights legislation is amply illustrated by our decision in *Sullivan v. Little Hunting Park*, 396 U.S. 229, 24 L.Ed. 2d 386, 90 S.Ct. 400 (1969). In Sullivan, the Court was confronted with a question as ' · the availability of damages in a suit concerning discrimination in the disposition of property brought pursuant to §1982 which makes no express provision for a damages remedy. The Court concluded that '[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies,' id., at 239, 24 L.Ed. 2d 386, and proceeded to construe §1988, which provides the governing standard in such a case, to mean 'that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. . . .The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired.' Id., at 240, 24 L.Ed. 2d 386. Properly viewed, then, §1988 instructs federal courts as to what law to apply in causes of actions arising under civil rights acts."

In *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (CA7, 1986), the Seventh Circuit followed this approach.

> "[19,20] 8. The judge was also right to add prejudgment interest to the award of backpay. Allis-Chalmers cites cases which hold that prejudgment interest is proper only when the amount of damages is fixed or readily computable, as by reference to market value; the classic example is a breach of contract action brought by the payee. See, e.g., *Afram Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358, 1370-71 (7th Cir. 1985). Even if the common law rule would not allow prejudgment interest in a case such as the present one, the rule would be inapplicable if inconsistent with the policy of the federal law. *Burnett v. Grattan*, 468 U.S. 42, 104 S.Ct., 2924, 82 L.Ed. 2d 36 (1984); see *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 1942-44-85 L.Ed. 2d 254 (1985); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S.Ct. 400, 406, 24 L.Ed. 2d 336 (1969).
>
> ". . . .The curious thing about cases dealing with the award of prejudgment interest to federal civil right plaintiffs is that most of the cases treat it as a matter within the discretion of the district judge, even when, as in this case, the principal to which it is sought to be affixed is an award of backpay under a civil rights statute. See, e.g., *Heiar v. Crawford County, supra*, 746, F.2d at 1201, 1202-03; *Taylor v. Philips Industries, Inc.*, 593 F.2d 783, 787 (7th Cir. 1979) (per curiam); *EEOC v. Rath Packing Co.*, 787 F.2d 318, 333 (8th Cir. 1986); *Earnhardt v. Commonwealth of Puerto Rico*, 744 F.2d 1,3 (1st Cir. 1984); *EEOC v. Wooster Brush Co. Employees Relief Ass'n*, 727 F.2d 566, 578-79 (6th Cir. 1984). The common law rule would, as we have pointed out, award prejudgment interest as a matter of course in such cases. Thus, the federal rule treats civil rights (and other federal question)

plaintiffs less generously than plaintiffs in cases under state law, and it is hard to understand why this should be so and how it could be consistent with 42 U.S.C. §1988."

The application of §1988 to support prejudgment interest was reiterated in *Williamson v. Handy Button Machine Co.*, supra:

"We also disagree with the premise of the district court's decision – that a court has discretion in §1981 litigation to deny an award of prejudgment interest on an award of back wages because the court does not approve of the jury's award. Under 42 U.S.C. §1988 a federal court is supposed to follow principles of state law when federal law does not supply a rule of decision. We observed in *Hunter*, 797 F.2d at 1426, that the common law requires judges to add prejudgment interest to awards of back pay. Neither the district court nor Handy Button cited any contrary statement of the law in Illinois, the forum state."

The First Circuit held directly the opposite in *Furtado v. Bishop*, (1979), supra:

" . . . In civil rights cases brought under 42 U.S.C. §1983, courts are required by 42 U.S.C. §1988 to look first to federal law on all matters, but to turn to the law of the forum state if federal law does not cover the issue . . . 42 U.S.C. §1988. Whether some prejudgment interest law applies in this case therefore hinges on whether federal law on the subject is viewed as 'deficient'. See *Robertson v. Wegmann*, 436 U.S. 584, 588, 98 S.Ct. 1991 (1978).

"We rule that resort to state law on prejudgment interest was not required. Although we have found no cases on point, several Supreme court opinions are instructive. On one hand, the Court has applied state survivorship law and statutes of limitations in federal civil rights litigation. Id. at

> 594-95, 98 S.Ct. 1991; *Johnson v. Railway Express Agency*, 421 U.S. 454, 462-66, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975). On the other hand, the Court has indicated that federal courts should fashion appropriate rules for damages in section 1983 actions. *Carey v. Piphus*, 435 U.S. 247, 257-59, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). See *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238-40, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969). We think that the issue of prejudgment interest is closely allied with that of damages, and that a federal rule should, therefore, be developed for an action under 42 U.S.C. §1983. This is altogether in keeping with the approach to prejudgment interest in *Rodgers v. United States*, 332 U.S. 371, 373, 68 S.Ct. 5, 7, 92 L.Ed. 3 (1947), where, in barring prejudgment interest on penalties exacted under the Agricultural Adjustment Act, the Supreme Court said, 'in the absence of an unequivocal prohibition of [prejudgment] interest . . . this Court has fashioned rules which granted or denied interest on particular statutory obligations by an appraisal of the congressional purpose in imposing them and in light of general principles deemed relevant.'
>
> "Declaring that a federal rule should govern prejudgment interest in civil rights actions under 42 U.S.C. §1983 is easier than formulating a rule."

The difficulty with the conclusion of the First Circuit is that there is no Federal rule governing prejudgment interest. As demonstrated in the discussion on the first issue presented in this petition, the lack of guidelines or a rule has resulted in disparate results, inconsistent reasoning and a frustration of the Supreme Court's intent to make prejudgment interest presumptively due as gleaned from *GMC v. Devex*, supra and *West Virginia v. U.S.*, supra.

Granting certiorari in this case would define a Federal Rule for prejudgment interest to the benefit of the bench and bar serving the public.

Respectfully submitted,

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No. 87-1446

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN B. YOUNG, Plaintiff-Appellant, v. CARL E. LANGLEY and WILBUR E. BOND, jointly and severally, Defendants-Appellees, NATIONAL BEN FRANKLIN INSURANCE COMPANY, Garnishee, Defendant-Appellee.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN (Filed Febr. 19, 1988)

BEFORE: LIVELY, Chief Judge; JONES and BOGGS, Circuit Judges.

PER CURIAM. John Young appeals the district court's decision denying his request for prejudgment interest on damages awarded him by the jury in an action brought under 42 U.S.C. §1983. We find that the district court did not abuse its discretion and accordingly, affirm the decison denying the motion for prejudgment interest.

I

In December 1980, Young sued Carl Langley and Wilbur Bond, the then Sheriff and Under Sheriff of Lapeer County, Michigan, for violation of his civil rights. Young had served as Deputy Sheriff to the defendants. After Young decided to run for Sheriff, the defendants demoted him to turnkey, suspended him for allegedly allowing a prisoner to escape and informed

the local press about his misconduct. Young claimed the defendants' actions violated his First and Fourteenth Amendment rights and caused him to lose the 1980 primary election for Sheriff.

A jury awarded Young $350,000 in compensatory damages and $400,000 in punitive damages. The jury's award was upheld on appeal. *Young v. Langley*, 793 F.2d 792 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 436 (1986).

Subsequently, the district court, after slight modification, granted Young's motion to tax costs and award attorney fees pursuant to 42 U.S.C. §1988 but denied the part of Young's motion which requested prejudgment interest on the jury's awards. After noting that an award of prejudgment interest is entrusted to the trial court's discretion and that the general purpose of the award is to make the plaintiff whole, the court concluded:

> plaintiff has given no indication why an award of prejudgment interest would be particularly appropriate in this case, especially since plaintiff received a substantial award, including punitive damages.* Therefore, the court will not exercise its discretion in this case to award prejudgment interest to plaintiff.

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* It has always been the opinion of the Court that not only were the damages excessive in the light of the evidence but also that it was error the way plaintiff's counsel argued damages to the jury. Neither of these subjects were preserved by objection or presented by way of postjudgment motion. Thus they were not considered on appeal and of course, not corrected at the trial court level. Since the Court still feels the damages were

greatly in excess of what they should have been, this militates against prejudgment interest.

II

This circuit adheres to the rule that in an action based on federal question jurisdiction, the award of prejudgment interest is committed to the sound discretion of the trial court. *E.E.O.C. v. Wooster Brush Co. Employees Relief Assoc.*, 727 F.2d 566, 579 (6th Cir. 1984); *Bricklayers' Pension Trust Fund v. Taiariol*, 671 F.2d 988, 990 (6th Cir. 1982).

As the Supreme Court has acknowledged, "[p]rejudgment interest is an element of complete compensation". *West Virginia v. United States*, 107 S.Ct. 702, 706 (1987) (involving an action based on a contractual debt); *see also General Motors v. Devex Corp.*, 461 U.S. 648, 654-55 (1983) (involving an action for patent infringement). The award "serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." *West Virginia v. United States*, 107 S.Ct. at 706 n. 2. However, the Court also has admonished that even in cases where the presumption should be in favor of the award, a trial court must have some discretion to deny the award in appropriate cases. *General Motors v. Devex Corp.*, 461 U.S. at 656-67.

One instance when the denial of the award is appropriate is when, as in this case, the district court concludes that the plaintiff has been compensated fully for the injury he has suffered. In such a case, the

plaintiff has been made whole and there is no reason to grant the award.

We note in passing that if Judge Newblatt truly was convinced at the time the jury returned its verdict that the damage awards were excessive, the Federal Rules of Civil Procedure provide the trial court with more appropriate vehicles for expressing its view of the jury's awards[1] than does a footnote to a memorandum opinion rendered many days after the entry of judgment and the affirmation of that judgment on appeal. However, we do not believe that Judge Newblatt's expression of his view of the jury's award constitutes an abuse of discretion. The rule governing the award requires a district court to consider whether in its opinion the plaintiff has been compensated fully for his injury. Judge Newblatt followed this procedure and we cannot conclude that the decision he arrived at was an abuse of his discretion.

Accordingly, the decision of the district court denying the request for prejudgment interest is AFFIRMED.

No. 87-1446, *John B. Young v. Carl E. Langley, et al.*

JONES, Circuit Judge, dissenting. I respectfully disagree with the majority in that I find the district court's actions to be an abuse of discretion.

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[1] For example, Fed. R. Civ. P. 59(d) provides:

(d) *On Initiative of Court.* Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason which it might have granted a new trial on motion of a party. . . .

As stated by the majority, prejudgment interest is designed to restore an injured party to his or her pre-discrimination posture. It is also designed to further the goals and purposes of the particular federal statute under which a plaintiff's actions might have been brought; in this case, 42 U.S.C. §1983 (1982). *See Bricklayers' Pension Trust Fund v. Taiariol*, 671 F.2d 988, 989 (6th Cir. 1982) ("[T]he Supreme Court . . . [has] directed [in *Rodgers v. United States*, 332 U.S. 371, 373 (1947)] that the decision to grant or deny prejudgment interest should hinge on whether to do so would further the congressional purposes underlying the obligations imposed by the statute in question.").

In reviewing the district court's decision to deny prejudgment interest, I find no reliance on either of the above-mentioned grounds upon which the district court might have properly based its decision. Rather, I find a decision based upon a personal opinion, held by the district court judge, that the damages awarded to the plaintiff by an impartial jury were excessive. While it is true that plaintiff received substantial damages, that award has previously been affirmed by this court, *Young v. Langley*, 793 F.2d 792 (6th Cir.), *cert. denied*, 107 S.Ct. 436 (1986), and it is now too late for us or the district court to hold to the contrary.

The plaintiff in this case filed his complaint in 1980; in 1988, he is still involved in the appeals process. The plaintiff argues that prejudgment interest is necessary to prevent him from being denied the time value of his money. This factor, along with the above-mentioned factors, are the proper criteria to be considered by a *district court* when determining whether to

award prejudgment interest. *These factors* are the relevant criteria; not the factors set forth in the district court's opinion.

Accordingly, I would reverse the district court's denial of prejudgment interest and remand the case to permit the district court to properly exercise its discretion and make a determination based upon the proper criteria.

ISSUED AS MANDATE: March 17, 1988

COSTS: NONE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN B. YOUNG,
Plaintiff,

v.

CARL E. LANGLEY and WILBUR E. BOND, jointly and severally,
Defendants,

and

NATIONAL BEN FRANKLIN INSURANCE COMPANY,
Garnishee-Defendant.

CIVIL ACTION
NO: 80-40407
(Received April 23, 1987)

MEMORANDUM OPINION AND ORDER

One of the outstanding matters in this case is the request of plaintiff's counsel for costs and attorney fees pursuant to 42 U.S.C. §1988, for both his trial and appellate work, and prejudgment interest on the jury award. There is no dispute that plaintiff was the prevailing party in the underlying action; the litigation has spanned a seven year period, with two trials, appellate review and finally, a denial of certiorari.

* * *

PREJUDGMENT INTEREST

Plaintiff has requested that defendants be ordered to pay interest on the judgment, including the punitive damages, from the date that the lawsuit was filed, an amount he claims to be in excess of $400,000. The general rule regarding such an award in this Circuit is that a District Judge may award this interest in his

discretion. *Bricklayers' Pension Trust Fund v. Taiariol*, 671 F.2d 98 (6th Cir. 1982) (Post judgment interest statute, 28 U.S.C. §1961, does not bar an award of prejudgment interest by its silence). Mosts of the cases cited by the parties focus on the rate of interest to be applied in the event that an award is made, rather than the guidelines to be used to determine whether interest should be imposed at all. The decision in *EEOC V. Wooster Brush*, 727 F.2d 566 (6th Cir. 1984) is somewhat instructive on the latter issue. The Court seems to indicate that awarding interest is appropriate in Title VII actions to restore the injured party to her pre-discrimination posture. However, plaintiff has given no indication why an award of prejudgment interest would be particularly appropriate in this case, especially since plaintiff received a substantial award, including punitive damages.* Therefore, the Court will not exercise its discretion in this case to award prejudgment interest to plaintiff.

* * *

---

* It has always been the opinion of the Court that not only were the damages excessive in the light of the evidence but also that it was error the way plaintiff's counsel argued damages to the jury. Neither of these subjects were preserved by objection or presented by way of postjudgment motion. Thus they were not considered on appeal and of course, not corrected at the trial court level. Since the Court still feels the damages were greatly in excess of what they should have been, this militates against prejudgment interest.

CONCLUSION

For the foregoing reasons, IT IS ORDERED that plaintiff's counsel's Motion to Tax Costs, Attorney's Fees and Prejudgment Interest shall be GRANTED IN PART as to the costs and attorney's fees to the extent set forth below and DENIED as to the award of prejudgment interest. Defendants are hereby ORDERED to pay plaintiff's counsel $68,940.00 in attorney's fees and $1,266.47 in costs, or a total of $70,206.47, to be taxed by the Clerk of the Court.

IT IS SO ORDERED.

/s/ STEWART A. NEWBLATT
United States District Judge

4-21-87

(2)

87-1907

Supreme Court, U.S.
FILED
JUL 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

JOHN B. YOUNG,

Petitioner,

vs.

CARL E. LANGLEY, WILBUR E. BOND,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

FIRST ISSUE

Does a conflict exist among the Circuit Courts of Appeal in determining when to award prejudgment interest in § 1983 civil rights cases?

SECOND ISSUE

Does Title 42 U.S.C. § 1988 not mandate the award of pre-judgment interest premised upon the law of the forum?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
JURISDICTION	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
I. No conflict exists among the Circuit Court of Appeal in determining when to award pre-judgment interest in § 1983 civil rights cases	2
II. Title 42 U.S.C. § 1983 does not mandate the award of pre-judgment interest premised upon the law of the forum	6
CONCLUSION	9

TABLE OF AUTHORITIES

Page

Furtado v. Bishop, 604 F.2d 80 (1st Cir. 1979), *cert. den.* 444 U.S. 1035, 100 S.Ct. 710, 62 L.Ed.2d 672 ..... 6, 7

G.M.C. v. Devex, 461 U.S. 648, 76 L.Ed.2d 211, 103 S.Ct. 2058 (1983) 3

Hamman v. Southwestern Gas Pipeline, Inc., 821 F.2d 229 (5th Cir. 1987) 2

Robertson v. Wegmann, 436 U.S. 584, 198 S.Ct. 1991 (1978) 8

Royal Indemnity Co. v. United States, 313 U.S. 289, 85 L.Ed.2d 1361, 61 S.Ct. 995 (1941) 7

Williamson v. Handybutton Mac. Co., 817 F.2d 1290 (7th Cir. 1987) 4

OPINIONS BELOW

Defendants-Respondents, Carl E. Langley and Wilbur E. Bond, adopt the Plaintiff-Petitioner's recitations of the Opinions Below.

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Defendants-Respondents, Carl E. Langley and Wilbur E. Bond, adopt the Plaintiff-Petitioner's recitations of the Constitutional and Statutory Provisions Involved.

———o———

JURISDICTION

Defendants-Respondents, Carl E. Langley and Wilbur E. Bond, accepts the statement of jurisdiction made by the Plaintiff-Petitioner.

———o———

STATEMENT OF THE CASE

Defendants-Respondents, Carl E. Langley and Wilbur E. Bond, do not contest the Statement of Case set forth by the Plaintiff-Petitioner for purposes of the instant Petition.

———o———

REASONS FOR DENYING THE WRIT

I.

No conflict exists among the Circuit Courts of Appeal in determining when to award pre-judgment interest in § 1983 civil rights cases.

Throughout his Brief in support of his contention that there exists a conflict among the Circuit Courts of Appeal on the issue of whether or not to award pre-judgment interest on § 1983 cases, the Petitioner has cited numerous cases relating to contract claims, Title VII back pay claims, and patent infringement cases that suggest disparate treatment of prevailing parties. The Petitioner has failed to present to this Court any conflict among the Circuits regarding the award of pre-judgment interest in § 1983 civil rights cases.

It is true that in cases where the District Court's jurisdiction is premised upon diversity that prejudgment interest is frequently awarded upon judgments. *Hamman v. Southwestern Gas Pipeline, Inc.*, 821 F.2d 299 (5th Cir. 1987). Jurisdiction in this case, however, was not premised upon diversity, but rather upon a federal question. As stated by the 6th Circuit in affirming the trial court's decision not to award prejudgment interest in this case:

> "This Circuit adheres to the rule that in an action based on federal question jurisdiction, the award of prejudgment interest is committed to the sound discretion of the trial court. *E.E.O.C. v. Wooster Brush Co. Employees Relief Assoc.*, 727 F.2d 566, 579 (6th Cir. 1984); *Bricklayer's Pension Trust Fund v. Taiariol*, 671 F.2d 988, 990 (6th Cir. 1982)."
> (Page A-3 of Petition).

The issue thus presented, is whether this Court should grant the Petitioner's Writ in order to determine whether District Courts should continue to exercise their discretion in determining the propriety of prejudgment interest in § 1983 cases, or, as suggested by Plaintiff, a mandatory rule should be adopted that removes from the District Courts their discretion in making such determinations.

In support of his contention, the Petitioner has mischaracterized certain case law. Without enumerating those instances, attention is called to Page 5 of the Petition wherein it is stated:

> "Once a victim of discrimination has proved his or her legal entitlement to a judgment for damages in a 42 U.S.C.A. § 1983 case, '. . . prejudgment interest should ordinarily be awarded absent some justification for withholding such an award. . .' *G.M.C. v. Devex.*"

Contrary to the suggestion made by the Petitioner, *G.M.C. v. Devex,* 461 U.S. 648, 76 L.Ed. 2d 211, 103 S. Ct. 2058 (1983) is not a §1983 case, but rather, is a patent infringement case.

G.M.C. v. Devex, supra, concerned itself with "the proper standard governing the award of prejudgment interest in a patent infringement suit under 35 U.S.C. § 284." 461 U.S. 649. This Court ruled that prejudgment interest should ordinarily be awarded in patent infringement cases in order to insure that the patent owner was placed in as good a position as he would have been had the infringer entered into a reasonable royalty agreement. This Court went on to state, however:

> "We do not construe § 284 as requiring the award of prejudgment interest whenever infringement is found. That provision states that interest shall be 'fixed by the court,' and in our view it leaves the court some discretion in awarding prejudgment interest. For example, it may be appropriate to limit prejudgment interest, or perhaps even deny it altogether, where the patent owner has been responsible for undue delay in prosecuting the lawsuit. There may be other circumstances in which it may be appropriate not to award prejudgment interest. We need not delineate those circumstances in this case. We hold only that prejudgment interest should be awarded under § 284 absent some justification for withholding such an award." 461 U.S. 656,657.

Thus, even though the Court found, based on statutory language which amended the patent laws and made reference to an award of interest upon recovery, that interest should be awarded in most patent infringement cases, the Court left to the discretion of the trial court whether or not interest should actually be awarded in any given case.

In the present case, as noted by the trial judge, Plaintiff received a substantial award. In determining whether or not prejudgment interest should be awarded in any given case, based upon the trial court's discretion, the 7th Circuit in *Williamson v. Handybutton Mac. Co.,* 817 F.2d 1290 (7th Cir. 1987), a case involving a claim for back pay brought pursuant to 42 U.S.C. § 1981, noted that prejudgment interest was part of full compensation under a variety of federal statutes which, the 7th Circuit indicated, was necessary to carry out the federal policies of compensation and deterrence. In explaining its decision to remand *Williamson, supra,* to the District Court for a determination of prejudgment interest, the Court stated:

"Money today is simply not a full substitute for the same sum that should have been paid some time ago. Prejudgment interest therefore must be an ordinary part of any award of back pay (or other incurred expense) under § 1981.

"'Ordinary' does not imply inevitable. *Devex* allowed that an award might be inappropriate at some times (citations omitted). Substantial, unexplained delay in filing suit might be such a reason because delay shifts the investment risk to the defendant, allowing the plaintiff to recover interest without bearing the corresponding risk. *Williamson,* though, filed this suit in 1978. The size of the jury's verdict may be another, if only the supposition that the jury has compensated plaintiff for the time value of money can explain the result. This verdict is not so large; it does not seem to cover even actual loss.

"There is one other reason why prejudgment interest may be denied—because 'the amount of back pay is not readily determinable.' '*Domingo v. New England Fish Co.*, 727 F.2d 1429, 1446 (9th Cir. 1984). Interest is not available on lost future wages and pensions; the time value of money is taken into account when these are discounted to present value. Only back pay and expenses incurred in the past may be augmented by prejudgment interest." *Williamson, supra,* 1297-1298.

Thus, even in cases involving claims for back pay, at least in cases where the amount of back pay is "readily ascertainable" claims for prejudgment interest may properly be denied in certain situations, included among them those in which the size of the verdict has succeeded in making the plaintiff whole. As noted by the District Court in the instant litigation, the Plaintiff in this action received a substantial award, which included punitive damages. No back pay was in issue in the instant case, and

certainly there was no amount of damages that could be deemed "readily ascertainable."

In the few § 1983 cases cited by the Plaintiff, included among them being *Furtado v. Bishop,* 604 F.2d 80 (1st Cir. 1979), *cert. den.* 444 U.S. 1035, 100 S. Ct. 710, 62 L.Ed. 2d 672, prejudgment interest has been deemed to be awardable in the sound discretion of the Court. Upon that rule there exists no conflict among the Circuits, and the contrary contention should not be a basis for granting a Writ of Certiorari.

II.

Title 42 U.S.C. § 1988 does not mandate the award of prejudgment interest premised upon the law of the forum.

As addressed in connection with Issue I, an award of prejudgment interest on § 1983 claims has been deemed throughout the United States to be vested in the sound discretion of the trial court. That discretion having been vested, there is no need to adopt a mandatory rule that will necessarily vary from state to state, which state statutes (presuming their existence in every state which is clearly not the case) would not have been enacted with the same congressional purpose involved in the enactment of § 1983 in mind.

The 1st Circuit in *Furtado v. Bishop,* 604 F.2d 80 (1st Cir. 1979), discussed the considerations to be made in any attempt to formulate a federal rule regarding prejudgment interest on § 1983 claims. It stated:

> "Declaring that a federal rule should govern prejudgment interest in civil rights actions under 42 U.S.C. § 1983 is easier than formulating a rule. There

> are, of course, three options: prejudgment interest could be (1) mandatory, (2) discretionary, or (3) barred. We find little to recommend a mandatory rule. The injury suffered by plaintiffs in civil rights actions are often intangible, and prejudgment interest will not always be necessary to compensate them fully. (Citation omitted). Assuming that prejudgment interest can also legitimately have a punitive purpose when a defendant has obstinately delayed payment to an injured party, (citations omitted) such interest will not be warranted in every case. By the same token, we have reservations about an inflexible rule barring prejudgment interest in a § 1983 action. Such a rule is arguably appropriate because § 1983 creates a species of tort liability, and prejudgment interest on the typical unliquidated tort claim was not recoverable at common law." *Furtado, supra,* at 97-98.

Thus, there are difficulties with any rule that is adopted. This Court, however, has already addressed the issue as to whether or not a state statute would mandate the award of interest in a case premised upon a federal claim. It ruled:

> "The rule governing interest to be recovered as damages for delayed payment of a contractual obligation to the United States is not controlled by state statute, or local, common law. In the absence of an applicable federal statute, it is for the federal courts to determine, according to their own criteria, the appropriate measure of damage, expressed in terms of interest, for non-payment of the amount found to be due." *Royal Indemnity Co. v. United States,* 313 U.S. 289, 296, 85 L.Ed. 2d 1361, 61 S. Ct. 995 (1941).

The Petitioner in this case would divest the Federal Courts of their discretion to determine whether or not prejudgment interest should be awarded. He would leave

to the individual decisions of state legislatures what interest, if any, should be awarded upon a claim based on a federal statute.

Resort to the state prejudgment interest law should only be had in a situation when, pursuant to 42 U.S.C. § 1988, Federal law on the subject is viewed as "deficient." *Robertson v. Wegmann,* 436 U.S. 584, 588, 198 S. Ct. 1991 (1978).

In *Furtado, supra,* as quoted at length by the Petitioner at pages 21 and 22 of his Petition, the Supreme Court has fashioned rules which granted or denied interest on particular statutory obligations by an appraisal of the congressional purpose in imposing them and in light of general principles deemed relevant.

To simply adopt as a Federal rule the requirement that Federal Courts look to state prejudgment interest statutes to determine what, if any, interest should be allowed on § 1983 claims, would remove from the Federal Courts their discretion to formulate remedies for the cases that come before them. It also would serve to deny interest to those individuals successful upon such claims in states that have no prejudgment interest statutes.

While the adoption of a state statute as the federal rule for prejudgment interest might make for a simpler rule, the proper rule is to continue to vest that decision-making process in the sound discretion of the trial court.

CONCLUSION

For the above reasons, the Defendants-Respondents, Carl E. Langley and Wilbur E. Bond, request that this Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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